Supreme Court of the United States.

LA ABRA SILVER MINING COMPANY, Appellant,
vs.
THE UNITED STATES.
No. 498.

Appeal from the Court of Claims.

Motion by the Appellant that the Constitutional objections to the Jurisdictional Act be first heard and determined.

Comes now the appellant, by Crammond Kennedy, its solicitor and of counsel, and moves the Court that the appeal in this cause be first heard on the questions involving the constitutionality of the act of December 28, 1892 (27 Stats., 409), under which these proceedings were brought by Mr. Attorney-General for the United States in the Court of Claims.

Among the constitutional objections raised by the respondent's demurrer below was the following:

> "I. That by the Constitution and laws of the United States the subject-matter of the complainant's suit is not within the jurisdiction of this honorable Court or of any court of the United States, but is within the final and exclusive control of the Executive department of the Government of the United States."

The same objection is stated more at large in the second paragraph of the respondent's demurrer, as follows, (Record, 311, 312):

> "II. That the question whether the award which was rendered in favor of the defendant, La Abra Silver Mining Company, by Sir Edward Thornton, as umpire of the United States and Mexican Claims Commission, under the treaty of July 4, 1868, between the United States and Mexico, was obtained in whole or part by fraud; and the question whether the whole or any part of the money received and remaining undistributed by the Secretary of State on account of the said award should be returned by the President of the United States to the Government of Mexico, are not, nor is either of them competent, fit, or proper to be considered and finally determined by this honorable Court, or by any municipal court of either of the two sovereign parties to the said treaty, but that the said questions are, and each of them is, of diplomatic or political nature and cognizance, and that Congress has no power to authorize this honorable Court, or any court of the United States, to consider and finally determine the said questions, or either of them, as against the powers and discretion appertaining to the Executive department of the Government of the United States."

It is admitted by the appellant that Congress, at the request or suggestion of the President, could authorize the Court of Claims to make an investigation of the charges and proofs submitted by the Mexican Government in this case, and to report its findings of fact and law to the President for his information and assistance in making any final disposition of the case which he might choose to make in the exercise of his constitutional authority in the premises; but the appellant denies that it is within the power of Congress to invest the Court of Claims with "full jurisdiction" to "determine" and

"finally adjudge" the questions submitted to the Court in the jurisdictional act, so as to bind the President and compel the substitution of the Court's opinion for his own, although, for example, he might believe that the dissenting opinion of the learned Chief Justice was more in consonance with the right of the matter, and ought to prevail.

That Congress intended to confer judicial power, in the sense of the Constitution, upon the Court of Claims in this case, appears not only from the terms employed in the jurisdictional act, but also from the provision for an appeal to this Court. That the appellee so understands the act appears from Mr. Attorney-General's averment in the XIVth paragraph of the bill of complaint (Record, 15):

> "And said law conferred full jurisdiction upon this honorable Court to hear and determine such suit, and to make all interlocutory and final decrees therein, and to enforce the same by injunction or any proper final process."

Mr. Attorney-General also averred in the bill of complaint (Record, 21, 22)—

> "That it is the right and duty of your orator (the United States) to have the facts relating to said claim and award inquired of by your honorable Court, and if it shall be adjudged by your honorable Court that the said award was obtained through fraud * * * to return the proceeds of said award to the said Republic of Mexico."

It was argued by the respondent below that if the decree of the Court of Claims binds and coerces the President, it is an encroachment upon his constitutional power and responsibility in a matter which belongs to the foreign affairs of the United States, and is, therefore,

of diplomatic cognizance and executive discretion, while if the opinion and decree of the Court of Claims are only advisory, no appeal lies to this Court.

Another constitutional objection to the bill is stated in the respondent's demurrer, as follows (Record, 314, 315):

> "That said act of Congress is inoperative and void on the further ground that it was never approved by the President of the United States as required by law, the only alleged approval which it ever received being on the 28th of December, A. D. 1892, when Congress was not in session, both Houses of Congress having adjourned (by concurrent resolution) on the 22d of December, A. D. 1892, to the 4th of January, A. D. 1893."

Other objections were taken to the jurisdictional act in the demurrer and answer below, but they need not be restated here. Only one more constitutional objection will be suggested for the purpose of this motion.

No case arising under the Constitution or laws of the United States is submitted to the Court by the jurisdictional act, but it simply puts a particular question to the Court, *i. e.*, whether the award was obtained from the United States Commissioner and Umpire by fraud of the company, its agents, attorneys, or assigns; and while the United States is plaintiff, no power is given to the Court to render judgment for or against the plaintiff, or to retry the claim on the merits and increase or reduce the award. The award can not be increased in any event, and it can not be diminished except for fraud in obtaining the whole or any severable part of it from the Commission. And the jurisdictional act itself pronounces the judgment, conditioned on the findings of the Court of Claims—a judgment which is not a judgment, because it could not be enforced, and there

might be the best of reasons, in the estimation of the President, why he should not return the money to Mexico. This conditional "judgment" prescribed by the jurisdictional act is as follows:

> "The President of the United States is hereby authorized to return to the said Government any moneys paid by the Government of Mexico on account of said award remaining in the custody of the United States that has not been heretofore distributed to said La Abra Silver Mining Company or its successors and assigns which such Court shall decide that such persons are not entitled in justice and equity to receive out of said fund."

It is contended that this phraseology shows on its face that the subject-matter of the so-called "suit" is neither within the judicial power of the Court nor the legislative power of Congress.

The jurisdictional questions raised by the demurrer and reiterated in the XIVth paragraph of the answer (Record, 454, 455) should be argued and decided before the case is heard on the merits, because (this being a suit in equity) all the evidence is brought up by the appeal, and much time and attention will be required for a proper discussion and consideration of the questions of fact and law involved in the case. There are four sets of evidence to be examined: (1) what was before the Mixed Commission *pro* and *con*. (Record, 9–195); (2) what was submitted *ex parte* by the Mexican Government in support of its charges against the award in the year 1878 (Record, 198–346); (3) what was taken in the Senate investigation in the year 1888–89, as to the use of which on this appeal a stipulation has been signed by the parties (Record, 854); and (4) what has been taken in this suit (Record, 461–802). There are also questions of the admissibility of parts of this evidence.

Referring to this evidence and these questions, the Court of Claims says, in the majority opinion on the merits (Record, 838):

> "This being a proceeding in equity, this Court is not called upon to settle the facts by the finding of ultimate facts for the consideration of the Supreme Court, but the whole record is transmitted to that Court, and the case is to be determined in the Supreme Court upon the law as it shall be adjudged and the facts as they shall be found by the decision of the Supreme Court."

This motion to divide the case as it was divided below and to have the jurisdictional questions heard and determined in the first instance, is made in consideration of the value of the time of the Court and of the impropriety of entering upon a long and laborious hearing on the merits, which might prove to have been unnecessary.

> "The question of jurisdiction * * * is always to be decided before the Court can properly inquire into the merits." (*Great West Ins. Co.* v. *U. S.*, 112 U. S., 197.)

To the Honorable Solicitor-General of the United States and the Honorable William A. Maury, special assistant to the Attorney-General:

Please take notice that the foregoing motion will be made in the Supreme Court of the United States at the opening of the said Court on Monday, January 17, 1898, or as soon thereafter as counsel can be heard.

Due and timely service of copies of the foregoing motion is hereby admitted this day of January, 1898.